No. 10-617

In the Supreme Court of the United States

SCOTT ROBERTS,

Petitioner,

v.

KAUFFMAN RACING EQUIPMENT, L.L.C.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause permits a state court to exercise personal jurisdiction over a non-resident defendant who expressly aims at the forum state a series of defamatory Internet postings arising from, and pertaining to, a prior course of commercial dealing with the plaintiff in the forum state?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Kauffman Racing Equipment L.L.C., an Ohio limited liability company, is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of the membership interests of Kauffman Racing Equipment L.L.C.

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REASONS FOR DENYING THE PETITION

The petition filed by Petitioner Scott Roberts ("Roberts") seeks a writ of certiorari for the purpose of having this Court decide whether the Due Process Clause of the Fourteenth Amendment permits a state court to exercise long-arm jurisdiction over a nonresident to adjudicate an Internet defamation claim based solely on the defendant's knowledge that the plaintiff resided in the forum state. The question as framed by Roberts, while seemingly intriguing, bears no resemblance to the case that was actually litigated in the Ohio courts. Respondent Kauffman Racing Equipment L.L.C. ("KRE") respectfully submits that the petition for certiorari should be denied for the following reasons.

I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTION RAISED IS NOT FAIRLY PRESENTED BY THE RECORD.

Rule 10 of this Court's rules of practice admonishes the erstwhile petitioner that a writ of certiorari is a matter of judicial discretion rather than entitlement, and will be granted only for "compelling reasons". This Court has emphasized that certiorari is not appropriate when the constitutional question proposed by the petition is not fairly presented by the record, *Rogers v. United States*, 522 U.S. 252, 253 (1998) or "is not presented with sufficient clarity," *McClanahan v. Morauer & Hatzell*, 404 U.S. 16 (1971); or when "the totality of the circumstances disclosed fails to support the substantial due process issues tendered in the petition[ ] for certiorari." *Boldanado v. California*, 366 U.S. 417 (1961).

Roberts's petition attempts to concoct a split of authority among federal and state courts regarding the due process limitations on the ability of a court in a plaintiff's home state to assert long-arm jurisdiction over a nonresident defendant to adjudicate an intentional tort claim arising from the defendant's defamatory postings on the Internet. In doing so, Roberts is presumably hoping to invoke the applicability of Subsection (b) of Rule 10, which provides that certiorari may be warranted when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals[.]" In Roberts's estimation, there is a "deep and long-standing conflict" in the federal and state appellate courts regarding the proper standard for deciding jurisdictional questions in these types of cases. Pet. 2.

KRE submits, however, that the perceived conflict is a mirage. The appellate court in each of the cases cited by Roberts endeavored to apply settled principles of Fourteenth Amendment law to the peculiar facts presented by the appellate record. None of the cited cases represents a break or departure from controlling precedent of this Court. *See e.g. Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 64, 751 A.2d 538, 553 (2000) ("Rather than to attempt to create a new order of jurisdictional analysis adapted to the Internet, we prefer in this case to adhere to the basics."); *Tamburo v. Dworkin*, 601 F.3d 693, 703, n. 7 (7th Cir. 2010) ("we hesitate to fashion a special jurisdictional test for Internet-based cases. *Calder* [*v. Jones*, 465 U.S. 783 (1984)] speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there

can be applied to cases involving tortious conduct committed over the Internet.")

In the final analysis, the decisions rendered in the cases cited by Roberts were the result of the distinctive set of facts presented in each. Roberts has simply not presented a credible argument in support of his claim that a split of authority exists regarding the applicable legal standard or that the ruling below represents an aberration from this Court's Fourteenth Amendment jurisprudence, sufficient to grant his writ of certiorari.

A. THE OHIO SUPREME COURT APPLIED PROPERLY-STATED RULES OF LAW FROM THIS COURT'S FOURTEENTH AMENDMENT JURISPRUDENCE IN HOLDING THAT AN OHIO TRIAL COURT MAY, CONSISTENT WITH PRINCIPLES OF FEDERAL DUE PROCESS, ASSERT LONG-ARM JURISDICTION OVER PETITIONER TO ADJUDICATE RESPONDENT'S INTENTIONAL TORT CLAIMS ARISING FROM PETITIONER'S DEFAMATORY POSTINGS ON THE INTERNET.

The Ohio Supreme Court cited this Court's opinion in *Calder v. Jones*, 465 U.S. 783 (1984) as authority for the principle that the forum state may assert long-arm jurisdiction over an out-of-state defendant to adjudicate an in-state plaintiff's defamation claim, provided the plaintiff makes a sufficient *prima facie* showing that the defendant "expressly aimed" his tortious activity at the forum state. App. 17a. In *Calder*, Hollywood actress Shirley Jones filed a lawsuit

in a California state court against the National Enquirer magazine, its editor, and one of its reporters, based on an allegedly libelous article published in that magazine. The article accused Jones of failing to meet her professional obligations due to her heavy drinking.

The magazine did not dispute the jurisdiction of the California court. In contrast, its editor and reporter, residents of Florida, argued that requiring them to defend the lawsuit in California would violate their rights under the First and Fourteenth Amendments. This Court rejected their constitutional challenge, noting that "petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious actions were *expressly aimed* at California." *Id.* at 789 (emphasis supplied).

The *Calder* Court held that an inference of "express aiming" was supported by the following facts:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

Id. at 790 (footnote and internal citations omitted). The Court concluded that under this scenario, "[a]n

individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.*

The Ohio Supreme Court believed the jurisdictional issue before it was analogous to the one before the Court in *Calder*. It explained:

> To rephrase the court's conclusion in *Calder* in a question, should a company injured in Ohio need to go to Virginia to seek redress from a person who, though remaining in Virginia, knowingly caused injury in Ohio? Like the defendants in *Calder*, Roberts is not alleged to have engaged in untargeted negligence. Roberts's Internet commentary reveals a blatant intent to harm KRE's reputation. Roberts knew that KRE was an Ohio company. Roberts impugned the activities that KRE undertakes in Ohio. Roberts hoped that his commentary would have a devastating effect on KRE and that if there were fallout from his comments, the brunt of the harm would be suffered in Ohio.

App. 18a.

Roberts complains "the Ohio court held that the mere foreseeability of adverse effects in Ohio does not allow Ohio to exercise jurisdiction over a nonresident whose actions produced those effects." Pet. 24. His complaint is fallacious and without merit. The Ohio Supreme Court explicitly disabused Roberts of the notion that Ohio's assertion of jurisdiction rested on "mere foreseeability":

Roberts argues that mere foreseeability by a nonresident defendant of the effects in the forum state is insufficient to justify the exercise of personal jurisdiction. Roberts's reliance on this conclusion is inapposite because the effects of his conduct went well beyond foreseeability: Roberts *intended* the effects of his conduct to be felt in Ohio. His statements were communicated with the very purpose of having their consequences felt by KRE in Ohio. The contention that his statements were not made with the purpose of injuring some person in Ohio is unavailing. The postings themselves indicate his purpose of injuring Kauffman. For example, on his October 18, 2006, posting, Roberts stated: "What I loose [sic] in dollars I will make up in entertainment at their expence [sic]." On October 19, 2006, he wrote: "Again, this is not to get a resolution. I have a much bigger and dastardly plan than that and this is a good place to start." Many of the postings name Kauffman directly and specifically mention Ohio.

Here, Roberts not only knew that Ohio resident KRE could be the victim, he intended that it be the victim. The allegedly defamatory communications concerned KRE's activities in Ohio. We are not dealing with a situation in which jurisdiction is premised on a single, isolated transaction. The posts detailed the transactions between Roberts and KRE. Moreover, the purchase of the engine block and subsequent transfers from Virginia to Ohio and back again served as the foundation from which this dispute arose. Roberts's allegedly

> defamatory posts were predicated on his course of dealing with an Ohio resident corporation. At least five Ohio residents other than Kauffman read these postings. Finally, although KRE does business nationwide, its business reputation is centered in Ohio, because Ohio is the location of its sole base of operations. Roberts knew, and in fact intended, that the brunt of the harm caused be felt by KRE in Ohio. Thus, the focal point of the damage was Ohio, and Roberts's actions therefore fulfill the requirement of causing a consequence in Ohio. Here, KRE has made a prima facie showing that Roberts purposefully availed himself of Ohio law. When viewed in a light most favorable to KRE, the evidence shows that Roberts intentionally and tortiously sought to harm KRE's reputation and negatively affect its contracts and business relationships. . . .

App. 22a-23a.

The Ohio Supreme Court also underscored that "express aiming" under *Calder* was not the only factor supporting personal jurisdiction. It cited this Court's opinion in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) as authority for the principle that before the forum state may assert long-arm jurisdiction over a nonresident for causing injury in that state, the claim must arise out of actions "by the defendant himself that create a 'substantial connection' with the forum State." *Id.*, quoting *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957).

Regarding the existence of a "substantial connection" between Roberts and Ohio, the Court

stated "KRE has made a prima facie showing that the cause of action arose from Roberts's contacts with Ohio. Not only does the cause of action arise from defamatory statements, those statements themselves are predicated on the business dealings between Roberts and KRE. The catalyst for Roberts's actions was his Ohio contacts. In fact, but for his contacts with Ohio, Roberts's allegedly defamatory statements would not have been posted." App. 24a-25a.

In sum, the Ohio Supreme Court correctly identified and stated the controlling legal principles from this Court's jurisprudence regarding the extent to which a forum state may assert long-arm jurisdiction over a nonresident to adjudicate an intentional tort claim for injuries suffered by one of its residents. The court properly applied these correctly-stated principles to the facts presented. The appellate record simply does not support Roberts's thesis that the Ohio Supreme Court premised its jurisdictional ruling exclusively on his knowledge of KRE's state of domicile or the "mere foreseeability" his misconduct would have consequences in Ohio.

B. THE PETITION FAILS TO DEMONSTRATE A CONFLICT BETWEEN THE DECISION OF THE OHIO SUPREME COURT AND THE CITED FEDERAL AND STATE APPELLATE DECISIONS REGARDING THE APPLICATION OF THESE PROPERLY-STATED RULES OF LAW TO INTENTIONAL TORT CLAIMS ARISING FROM USE OF THE INTERNET.

Roberts suggests that appellate cases from other jurisdictions can be divided into two groups. He characterizes the first group as applying a "knowledge-plus" standard. Under this view, a defendant's awareness of the state of plaintiff's residency is an insufficient basis for the assertion of long-arm jurisdiction. The plaintiff must produce additional facts connecting the defendant to the forum state. Roberts identifies decisions from the Fourth, Fifth and Eighth Circuits and the Minnesota Supreme Court as comprising the "knowledge-plus" group.[1] Pet. 11-14.

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[1] He also claims the federal Third Circuit belongs in this camp. His citation to *IMO Indus. v. Kierkert,* 155 F.3d 254 (3d Cir. 1998) and *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003) is, however, both puzzling and unpersuasive.

IMO Indus. did not involve an intentional tort claim arising from the use of the Internet. It was a lawsuit for business interference relating to the plaintiff's efforts to sell an Italian subsidiary to a potential French suitor. The court of appeals affirmed the dismissal of the German defendant because "the focus of the dispute--i.e. the proposed sale of an Italian company to a French company and a claim of rights by a German company pursuant to a license agreement apparently governed by German law--and the alleged contacts by Kiekert (i.e., its correspondence) all appear to be focused outside the forum." *Id.* at 256.

Toys "R" Us, Inc. involved a discovery dispute. The appellate court expressed serious doubt that the defendant, a Spanish corporation, could be sued in a New Jersey federal district court for unfair competition relating to its marketing of merchandise on two company websites. The court noted that "Step Two's web sites are entirely in Spanish; prices for its merchandise are in pesetas or Euros, and merchandise can be shipped only to addresses within Spain. Most important, none of the portions of Step Two's

Roberts claims a second group of cases permits the forum state to exercise long-arm jurisdiction solely on the basis of defendant's knowledge of the plaintiff's state of residence. He contends the decision of the Ohio Supreme Court in his case, along with decisions of the Seventh Circuit and the New Jersey Supreme Court, comprise this exclusive group. He expresses deep concerns that this "erroneous standard" will force the unwary individual to defend himself in a "distant court" merely for posting an unflattering critique of a product on an Internet chat room or bulletin board. This "expansive rule," proclaims Roberts, contravenes this Court's precedents and, "if permitted to stand," will chill the free flow of "individual expression." Pet. 2.

The asseveration that judicial rulings on this subject can be neatly pigeonholed in this manner is both fanciful and simplistic. Not only are there no legitimate conflicts, notwithstanding Roberts's assertion to the contrary, the Ohio Supreme Court's analysis is consonant with the approach taken in the "knowledge-plus" decisions.

The absence of any proof the defendant knew the location of the plaintiff's residence explains the result reached by the Fifth Circuit Court of Appeals in *Revell v. Lidov,* 317 F.3d 467 (5th Cir. 2002). In that case, the plaintiff filed a defamation suit in federal district court in his home state of Texas, against defendant Lidov, a

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web sites are designed to accommodate addresses within the United States." *Id.* at 454. Despite its skepticism, the Third Circuit remanded the case to the district court to allow the plaintiff to undertake "jurisdictional discovery." *Id.* at 458.

resident of Massachusetts, for posting a critical article on a university school of journalism website. Lidov filed an affidavit, "uncontroverted by the record, stat[ing] that he did not even know that Revell was a resident of Texas when he posted his article." The court of appeals held that *Calder* requires "[a] more direct aim . . . than we have here." *Id.* at 476.

The absence of proof of "express aiming" explains the results reached by the Fourth Circuit Court of Appeals in *Young v. New Haven Advocate,* 315 F.3d 256 (4th Cir. 2002), and the Minnesota Supreme Court in *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002). In *Goldhaber v. Kohlenberg*, 395 N.J. Super. 380, 387-388, 928 A.2d 948, 953 (2007), the New Jersey Appellate Division pointed out that *Griffis* and *Young* involved "the mere posting of messages upon such an open forum by a resident of one state that could be read in a second state. . . Those courts that have declined to find jurisdiction upon the basis of mere posting of messages upon an open on-line forum have done so either on the basis that there was insufficient evidence that the alleged tortfeasor had directed or focused the defamatory comments to the forum state or on the basis that the site in question was passive, as opposed to active or interactive." The *Goldhaber* court ruled that New Jersey could exercise long-arm jurisdiction over the defendant because "as opposed to the cases cited earlier, there is, in our judgment, evidence that the author of these messages did, indeed, target them to New Jersey." *Id.*, 395 N.J. Super. at 389, 928 A.2d at 953.

Admittedly, in some cases the jurisdictional question is more nuanced. In *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010), the plaintiffs filed suit in

Missouri against defendant Heineman, a resident of Colorado, for posting a message on an Internet chat board accusing them of operating a "kitten mill" in Missouri where "they killed cats, sold infected cats and kittens, brutally killed and tortured unwanted cats." The Eighth Circuit Court of Appeals stated "we . . . construe the *Calder* effects test narrowly, and hold that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction. . . . [T]here are no additional contacts between Heineman and Missouri to justify conferring personal jurisdiction." *Id.* at 797 (internal citation omitted).

Roberts's case is clearly distinguishable from *Johnson* because the relationship between his defamatory Internet postings and his prior transactional history with KRE in Ohio provided the "plus" factor (in addition to knowledge), justifying the assertion of long-arm jurisdiction. The Ohio Supreme Court found that "Roberts's allegedly defamatory posts were predicated on his course of dealing with an Ohio resident corporation." App. 23a. This course of dealing, said the court, satisfied the "substantial connection" requirement of this Court's opinion in *Burger King*. *Id.* 24a-25a.

II. THE PETITION SHOULD BE DENIED BECAUSE IT PRESENTS NOTHING BEYOND AN UNSUBSTANTIATED CLAIM THAT THE OHIO SUPREME COURT RELIED ON ERRONEOUS FACTUAL FINDINGS OR MISAPPLIED A PROPERLY STATED RULE OF LAW.

Rule 10 admonishes the petitioning party that "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This Court has held that certiorari is inappropriate when the dispute involves not a question of law, but rather a factual matter that is "of no importance save to the litigants themselves." *Rudolph v. United States*, 370 U.S. 269, 270 (1962).

Roberts contends the Ohio Supreme Court based its decision solely on two facts: "that petitioner posted comments to an Internet website with the intent to make others aware of what were – in Roberts's estimation – unreasonable business practices by the respondent . . . and that petitioner knew that respondent was based in Ohio . . ." Pet. 24. Roberts's contention is misleading at best since he conveniently overlooks or ignores other facts in the record supporting the court's decision.

These facts include: Roberts's extended course of dealing with KRE in Ohio; the relationship between the Internet postings and the prior course of dealings between the parties; the express aiming of Roberts's vituperative and inflammatory postings at Ohio; his intention and goal that the effects of his conduct would be felt by KRE in Ohio; and the identification of Ohio

residents who had read the postings. App. 18a, 22a-23a.

The Ohio Supreme Court rejected Roberts's jurisdictional challenge because of all of these significant and germane facts. He had an opportunity before both the Ohio Court of Appeals and the Ohio Supreme Court to persuade those tribunals that the application of controlling principles of federal due process to the facts involved justified the dismissal of KRE's lawsuit against him in Ohio. His disappointment over the Ohio Supreme Court's final ruling may be understandable, but his emotional reaction to the decision does not provide a legal basis sufficient to warrant this Court to grant certiorari in order to revisit the facts yet again.

CONCLUSION

A careful reading of the entire opinion of the Ohio Supreme Court establishes that the court accurately and correctly applied the "knowledge-plus" standard advocated by Roberts as the legal basis for his certiorari petition. The gravamen of Roberts's dissatisfaction with the ruling below has nothing to do with the Ohio Supreme Court's identification of the controlling legal standard it applied, but rather with its application of that standard to the facts presented. The record in this case is an entirely inappropriate one for this Court to decide the abstract question articulated in Roberts's petition. For these reasons, his petition for certiorari should be denied.

Respectfully submitted,

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